(5)

No. 06-378

FILED
JUN 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

SUPPLEMENTAL BRIEF

JOSEPH P. RUSSONIELLO
LORI R.E. PLOEGER
MATTHEW D. BROWN
Counsel of Record
COOLEY GODWARD KRONISH LLP
101 California Street, 5th Floor
San Francisco, CA 94111
(415) 693-2000
Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

SUPPLEMENTAL BRIEF

Having been advised that the petitioner in *Claiborne v. United States*, No. 06-5618, died on May 30, 2007, this Court, on June 4, 2007, vacated the judgment of the court of appeals in that case as moot. *Claiborne v. United States*, 551 U.S. __ (2007) (per curiam). The petition in *Thurston v. United States*, No. 06-378, provides an ideal vehicle for resolving the critical issues raised in the *Claiborne* petition regarding the imposition and review of sentences below the advisory Guidelines range.

On November 3, 2006, the Court granted certiorari in *Claiborne* to address the following issues:

> 1. Was the district court's choice of below-Guidelines sentence reasonable?
>
> 2. In making that determination, is it consistent with *United States v. Booker*, 543 U. S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

Thurston's certiorari petition, filed on September 14, 2006, presented a very similar issue:

> Whether it is permissible under the Sixth Amendment for a court of appeals reviewing a sentence for unreasonableness to give greater weight to the Guidelines sentencing range than to the other 18 U.S.C. § 3553(a) factors and to give less deference to district courts that impose sentences outside that range.

The government took the position in its response that Thurston's petition should be held as to this and another issue in light of the grant of certiorari in *Claiborne* and *Rita*

v. United States, No. 06-5754. Brief for the United States 12-13, *Thurston*, No. 06-378. The Court apparently has held Thurston's petition pending resolution of the issues presented in *Claiborne* and *Rita*.

The sentencing histories of the *Thurston* and *Claiborne* cases are markedly similar. Thurston, like Claiborne, was sentenced by the district court to a sentence below the advisory Guidelines range. The government appealed the sentences in both *Thurston* and *Claiborne*, contending that the sentences were not reasonable under *Booker*.

Both Claiborne's and Thurston's below-Guidelines sentences were overturned on appeal based in large measure on the same fundamental rationale, i.e., that the farther a sentence varies from the advisory Guidelines range, the more compelling the rationale must be to support such a variance. The Eighth Circuit requires that a substantial variance from the Guidelines be justified by "extraordinary circumstances." *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006). "'How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" *Id.* (quoting *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir. 2005)). Similarly, the First Circuit "consider[s] the reasonableness of a below-guideline sentence on a sliding scale: 'the farther the judge's sentence departs from the guidelines sentence the more compelling the justification based on the factors in § 3553(a) that the judge must offer . . . .'" App. 9a (citations omitted). Although the Eighth Circuit's and the First Circuit's doctrinal formulations differ slightly, their approaches are fundamentally the same.

Moreover, unlike *Claiborne* and *Thurston*, *Rita* involves a within-Guidelines sentence.[1] Although the resolution of the issues in *Rita* may have significant bearing on cases involving below-Guidelines sentences, considering a below-Guidelines sentence in tandem with a within-Guidelines sentence could significantly aid the Court in providing guidance on sentencing in the wake of *Booker*. As discussed in an amicus curiae brief filed in *Rita* and *Claiborne*, the *Thurston* case provides a good platform for addressing issues relating to below-Guidelines variances and specifically how providing undue weight to the Guidelines can violate section 3553(a)'s parsimony provision. *See* Brief of Washington Legal Foundation and Allied Educational Foundation as *Amici Curiae* in Support of Petitioners 18-22, *Rita*, No. 06-5754, and *Claiborne*, No. 06-5618 (Dec. 18, 2006); *see also id.* at 22-25 (*Thurston* is "Exhibit A in demonstrating the failure of the Guidelines to reduce disparity").

By granting certiorari in the *Thurston* case, the Court can address the issues recognized to be worthy of review in *Claiborne*. The lower courts are sorely in need of the Court's guidance on these issues.

---

[1] The Court's grant of certiorari in *Rita* was limited to the following questions: (1) Was the district court's choice of within-Guidelines sentence reasonable? (2) In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences? (3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?

For these reasons, Thurston requests that this Court consider his petition on the merits, in conjunction with *Rita* or otherwise, and offers to submit briefing on an expedited basis before the Court's summer recess.

Respectfully submitted,

JOSEPH P. RUSSONIELLO
LORI R.E. PLOEGER
MATTHEW D. BROWN
Counsel of Record
COOLEY GODWARD KRONISH LLP
101 California Street, 5th Floor
San Francisco, CA 94111
(415) 693-2000
Counsel for Petitioner

June 2007